In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 657

MILTON DUKE, MORTON L. KEMPER AND JOHN S. MAHLE, RECEIVER OF THE BOND CONSTRUCTION CORPORATION, PETITIONERS

v.

RECONSTRUCTION FINANCE CORPORATION, VICTOR FRENKIL, INDIVIDUALLY AND TRADING AS BALTIMORE CONTRACTORS, BALTIMORE CONTRACTORS, INC., AND UNITED STATES CASUALTY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland on the claim of the Reconstruction Finance Corporation (R. 182–186) is not reported. The opinion of that court on the motion of the third-party defendants to dismiss the third-party complaint (R. 200–213) is reported at 18 Fed. Rules Serv. 14a.15, Case 2. The opinion

of the United States Court of Appeals for the Fourth Circuit (R. 261–269) is reported at 209 F. 2d 204.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1954 (R. 269). The petition for a writ of certiorari was filed on March 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether this Court should review an award to Reconstruction Finance Corporation on an unconditional guaranty where the guarantor petitioners, who now claim that the judgment was premature for failure to consider further evidence on the scope of the guaranty, did not indicate in the District Court how such evidence would or could have affected the result.

2. Whether the District Court should have refused judgment on an unconditional guaranty because the creditor had failed to take action against other persons who might have been liable.

3. Whether the District Court should have admitted parol evidence of an agreement whose performance was not pleaded as a condition precedent to the guaranty and whose terms would not have affected the operation of the guaranty.

4. Whether, in the particular circumstances, the assignment to a creditor of claims of a subcontractor against the prime contractor requires that

the creditor proceed on these claims before making demand of the subcontractor's guarantors.

STATEMENT

This action arose over a guaranty made by petitioners Duke and Kemper to secure a loan by the Reconstruction Finance Corporation (RFC) to the Bond Construction Corporation (Bond). Bond had entered a subcontract for $85,400 with prime contractor Frenkil (trading as Baltimore Contractors) to do certain work in the construction of a reservoir for the District of Columbia. In order to finance its work, Bond applied for a loan of $71,500 from the RFC on February 2, 1944 (R. 216). The loan was recommended by an agency examiner on February 21, 1944 (R. 231), and was authorized by the Agency Review Committee on March 9 (R. 218, 220); both the recommendation and the authorization called for collateral including an "unconditional guaranty" from Duke and Kemper (R. 237, 219).

A note was executed by Bond on March 16, 1944 (R. 220), and among other documents delivered to RFC were (i) an assignment to RFC by Bond and Duke (who was president of Bond) of all moneys due or to become due under the subcontract with Frenkil (R. 244), and (ii) the guaranty of Duke and Kemper (R. 225). The assignment was accepted by Frenkil on March 24, 1944 (R. 247).

Bond began work in May 1944, but stopped on October 11, 1944, before completion, and turned the work over to Frenkil (Pet. 7). Bond's discontinuance resulted from financial difficulties, which it laid to Frenkil's failure to meet payments in accordance with the subcontract, and it later went into receivership.

The failure of Bond left it with a balance owing on its note to RFC, and demand for this amount was made on the guarantors (petitioners Duke and Kemper) on January 11, 1945 (R. 118), and on the receiver (petitioner Mahle) on January 17, 1945 (R. 117). RFC brought suit on March 13, 1951 (R. 2) against the guarantors only, as the guaranty had expressly provided might be done (R. 227). The guarantors' defense (R. 18–29) was based primarily on the allegation that by withholding payments Frenkil had fraudulently forced Bond off the reservoir project when its work was almost finished in order to complete the work himself, and that RFC, knowing this, had failed to seek its redress from him, and was therefore itself guilty of gross neglect, laches, and fraud. The answer further alleged that RFC had promised to enter an apportionment agreement with United States Casualty Company, surety for Bond's performance on the subcontract; that this agreement would have provided that a part of the payments to be made by the surety upon Bond's default would be paid to

RFC; that the agreement had not been entered (R. 22) and that the guarantors were therefore discharged (R. 28). The guarantors further averred that RFC had advanced a balance of more than $12,000 in contravention of a provision in the loan arrangement and, at the trial, also claimed that a provision of the loan authorization had been altered subsequent to the making of the loan.

The District Court found that the alteration in question had been added before the loan was made, and that the $12,000 limitation did not apply to the balance owing RFC (R. 182–186). The court then indicated that it would give judgment as prayed for by RFC (R. 186). Counsel for Frenkil, a third-party defendant,[1] at this point moved anew to dismiss the action against him (R. 189), and an opinion granting this motion was rendered on March 31, 1953 (R. 200–213). No evidence was taken on the question of the apportionment agreement, on the alleged collusion between RFC and Frenkil, or on certain documents in the loan transaction, notably the Loan Agreement of March 10, 1944, but judgment for $34,603.51 was entered for RFC on April 17, 1953 (R. 214).

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[1] The District Court had earlier granted the motion of Duke and Kemper to join Frenkil and his company as third-party defendants. Pet. 8–9, 10–11; R. 262. Frenkil then joined petitioner Mahle, Bond's receiver, as a fourth-party defendant. Pet. 11; R. 262.

Of the extensive third- and fourth-party proceedings instituted—set out in full in the Petition for a Writ of Certiorari (pp. 8–12)—only one involved RFC: a counterclaim by Mahle, the Bond receiver, a fourth-party defendant, against RFC alleging that by reason of the assignment from Bond to RFC he had been unable to proceed against Frenkil for amounts claimed to be due Bond, and praying that the assignment be declared of no further force and effect (R. 55–68). This counterclaim was not formally determined or dismissed.

ARGUMENT

What petitioners are asking of this Court is not that it review a decision on an important question of law but, rather, that it reexamine a particular set of circumstances, pertinent to this case only, which have already received the attention of both the District Court and the Court of Appeals. Moreover, they seek this review without revealing any reason to believe that a reversal in this Court would at all affect the ultimate result in the case. On the contrary, it appears from the documents in the record that, substantively, petitioners' cause is without merit, and that the procedural "error" of which they complain against RFC is wholly of their own making. In these circumstances, there is no call for this Court to take jurisdiction.

1. The petitioners' contentions in this Court, insofar as they affect RFC (Pet. 15, 17–18, 19, 39–49), are all based on the argument that the District Court acted prematurely in granting judgment for RFC without hearing testimony and considering documents which the petitioners claim were essential to a full hearing. But it should be noted in this connection that after the District Court had rendered its initial decision, and counsel for RFC had suggested that a judgment for his client might be entered immediately, counsel for petitioners Duke and Kemper said only (R. 186):

> I think we ought to wait until the end of the case. There is some additional testimony that ought to come in which will bear on this. There is another agreement which has not been introduced in evidence, the loan agreement itself. I think Your Honor should withhold final determination on that until the end of the case.

At this point the court stated that it would not sign the order at that time, although it clearly indicated that it felt the RFC aspect of the case was closed (R. 186). Counsel for the petitioners still failed to register an effective protest; he did not indicate in any way what he hoped to prove from further evidence, or how he would proceed to prove it. And just a few moments later, when he was asked what course the trial would take, he failed to specify how any showing which he would

make might reflect against RFC (R. 187–188). Moreover, he was at this point under no illusion as to the court's position that the petitioners' liability to RFC had been finally decided (R. 196). Even if it were not true—as we shall show below is true—that further evidence would have been unavailing, it should be too late now to seek review in this Court of a case controlled by peculiar circumstances, where the petitioners have completely failed to argue their claimed rights in the trial court.

2. The petitioners' allegations of fraud and negligence[2] reduce to a contention that the guaranty of payment (R. 225) was discharged because RFC did not diligently enforce its rights against collateral security additional to the guaranty, and this despite an express provision that RFC (R. 227–228):

> * * * shall not be required, prior to any such demand on, or payment by, the undersigned [guarantors], to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral.

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[2] The guaranty in question was under seal (R. 229), and the suit was at law, not in equity. Hence, petitioners' argument directed to the subject of laches is obviously inappropriate, and there is no claim that limitations has run.

Even without this express provision, the law applicable to guaranties of "payment", as opposed to guaranties of "collection", is that no resort need be had against the principal debtor or against other collateral before proceeding against the guarantor. *Terry* v. *Tubman,* 92 U. S. 156, 160. Such guaranties are said to be "unconditional" (Stearn's *Law of Suretyship,* Elder's Revision (5th Ed. 1951) 65), and it is noteworthy that here both the loan recommendation and the loan authorization call for an "unconditional guaranty."[3] The petitioners argue (Pet. 47) that, nevertheless, the guaranty was not unconditional since it was "subject to the provisions of any agreement between the Debtor or any other party and Reconstruction Finance Corporation at the time in force," and they cite several documents as incorporated by this provision. But except for the so-called apportionment agreement (discussed below) the petition does not indicate what effect any of those agreements which were not before the courts below might have had, and indeed there is no indication that the documents would have had any effect at all. From petitioners' scanty discussion of these agreements,

[3] The Court of Appeals quotes and discusses the other provisions of the guaranty showing conclusively that it was unconditional and that RFC could go against petitioners without seeking recovery from others or from collateral (R. 264–265).

one would have to conclude that they are wholly irrelevant. See also *infra*, pp. 12–14.

3. In this connection, petitioners also contend that the District Court erred in rendering a judgment without hearing evidence on or deciding the merits of their allegations that (R. 22–23):

> It was agreed between Duke and Kemper and the R. F. C., as part of the agreement or arrangement, that an apportionment agreement [be made] between the R. F. C. and the United States Casualty Company, a body corporate, surety on the construction bond given by Bond and Duke for the faithful performance by them of the Sub-contract of January 6, 1944, which apportionment agreement would have provided that in the event of default by Bond and Duke, the United States Casualty Company, as surety, would have paid a proportion of payments made by it to R. F. C. This apportionment agreement, however, was never actually entered into by R. F. C. and the United States Casualty Company, as surety.

They further submit that the Court of Appeals was in error in proceeding to pass upon this issue and holding that any evidence would be "an attempt to add to a written guaranty contract by parole" (R. 265).

The admissibility of evidence relating to the so-called apportionment agreement was strictly a question of law—the application of the parol

evidence rule—and there was therefore no error on the part of the Court of Appeals in deciding the question. Petitioners argue, however, that the court, without any proof, assumed that the alleged promise covering this apportionment agreement was to be proved by oral evidence, and it is true that the answer does not disclose the nature of the evidence they intended to submit. But it does not appear from the record that counsel for the petitioners made any specific protest or proffer on this point in the trial court when they had an opportunity to do so, and they do not even now declare that they have contemporaneous written proof of the agreement. In these circumstances, this Court should not take jurisdiction simply to decide what is, so far as now appears, a wholly academic issue unrelated to the real facts of this case.

The petitioners likewise contend that if they sought to establish the agreement by parol evidence it would nevertheless be admissible because it would show that obtaining the apportionment agreement was a condition precedent to the guaranty. But the petitioners did not plead in their answer that the apportionment agreement was such a condition; they merely alleged that it was a part of the entire loan transaction. Any evidence in support of that allegation would only vary the terms of the contract, contrary to the parol evidence rule, and would not prove that it

was invalid or that its existence was conditioned on the apportionment agreement.

In addition, the petitioners' argument that the promise to enter the apportionment agreement was an agreement to which the guaranty was subject by its terms ignores the distinction between a contract subject to the provisions of other agreements and a contract conditioned on the performance of other agreements. Nothing in the apportionment agreement, even if it had been made, would have altered the obligation of the guarantors who had expressly agreed that their liability would not depend on RFC's having first proceeded against any other person.[4]

4. Petitioners Duke and Kemper contend, finally, that the District Court could not render judgment on the guaranty "and disregard the other contract documents entered into on the same day as a part of the same transaction and other contract documents referred to therein" (Pet. 22, 46–49). However, as noted above (*supra*, pp. 9–10), petitioners do not indicate what

[4] It may also be noted that the apportionment agreement in question is designed only for use with prime contracts for the furnishing of supplies to the United States. As the Court of Appeals stated, it would be inappropriate to a subcontract because, upon default of the subcontractor, the rights and duties of the prime contractor and his sureties would intervene and limit the right of RFC and the subcontractor's surety to complete the contract and earn the sums payable (R. 265). It is upon this right that the apportionment agreement is entirely based.

they hoped to establish through the introduction of such documents as were not before the trial court. This Court should not grant review where the petitioners have failed to show how a procedural error of the courts below, if error there was, has resulted in a definite and vital injury to a meritorious cause.

In fact, the major document with which the petitioners seek to bolster their substantive position (Pet. 47–48) is one *which was before the District Court*—the assignment of March 16, 1944, from Bond (the subcontractor) and Duke to RFC. It is said that any requisitions for payment by Bond, the subcontractor, upon the prime contractor (Frenkil) which were not honored by him nevertheless vested in RFC the subcontractor's rights against him by virtue of this assignment. We do not dispute this. But it does not follow that RFC must therefore seek from Frenkil any amounts represented by these requisitions, and cannot go against the guarantors. Petitioners ignore the fact that, so far as RFC was concerned, these requisitions represented not payments but collateral (R. 218, 233), and that the guaranty expressly gave RFC the right to "deal in any manner with * * * the collateral" (R. 226), and thus to proceed against, or to forbear with respect to, any part of it. RFC was thereby assured that it would not have to contest any defenses or counterclaims which Frenkil might

have against the subcontractor.[5] Any requisitions which may have been accepted did not act to discharge the guarantors.

5. Petitioner Mahle, receiver of the Bond Construction Corporation, a fourth-party defendant in the District Court, counterclaimed to have the assignment from Bond and Duke declared to be of no further force and effect.[6] His contention was that the failure of RFC to enforce the assigned claims against Frenkil, after the receiver had given it reason to believe that Frenkil had acted fraudulently, had prejudiced the receivership estate since he was precluded by the assignment from proceeding against Frenkil on the estate's behalf. The basic demand seems to be that RFC must be forced to choose between proceeding itself against Frenkil and permitting the receiver to do so.[7] This position ignores the clear provisions of the note, by which Bond—in whose place the receiver stands—gave RFC full discretion in dealing with the collateral, including the right of forbearance. Moreover, as the Bond estate is primarily liable on the note,

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[5] Frenkil's acceptance was expressly made "subject to all conditions of the contract" (R. 247).

[6] This point is not contained in the Questions Presented (Pet. 15) or the Specification of Errors to be Urged (Pet. 21–22), but is discussed in the brief in support of the petition (Pet. 43–46).

[7] Like the guaranty, the assignment was executed under seal, and there can be no suggestion of bar by lapse of time. See fn. 2, *supra*, p. 8.

RFC cannot equitably abandon any rights which have been assigned to it since the guarantors, by meeting their obligation on the note, will become subrogated to those rights. The estate was given its opportunity to acquire any necessary right to proceed against Frenkil on the subcontract when demand for payment was made by RFC upon it on January 17, 1945.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari, insofar as it affects the Reconstruction Finance Corporation, should be denied.

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* RFC takes no position on the propriety of the District Court's dismissal of the third-party action (see *supra*, p. 5), except insofar as the receiver's counterclaim may have been affected thereby.

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